LIBRARY
SUPREME COURT, U.S.

JOHN T. FEY, Clerk

No. ~~710~~ 70

In the Supreme Court of the United States

OCTOBER TERM, 1956

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
J. F. BISHOP,
Attorney,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	3
Argument:	
I. Congress has the constitutional power to provide that United States nationality is lost by one convicted of desertion in wartime	4
II. The statute need not, and should not, be read as relating only to desertion to the enemy	6
Conclusion	10

CITATIONS

Cases:	
Mackenzie v. *Hare*, 239 U. S. 299	5
Perez v. *Brownell*, No. 572, this Term	3, 4, 10
Savorgnan v. *United States*, 338 U. S. 491	5
Statutes and Articles of War:	
Immigration and Nationality Act of 1952, Section 349 (a), 66 Stat. 267, 8 U. S. C. 1481 (a)	2
Nationality Act of 1940, Sec. 401 (g), 54 Stat. 1169	9
Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of January 20, 1944, 58 Stat. 4:	
Sec. 401 (g)	2, 9
Sec. 401 (h)	8
Sec. 401 (j)	9
Articles of War:	
Article 28 (41 Stat. 792; 10 U. S. C. (1946 ed.) 1499)	7
Article 58 (41 Stat. 800; 10 U. S. C. (1946 ed.) 1530)	6
Miscellaneous:	
89 Cong. Rec. 3239–3245, 7107–7108, 10134–10135, 10974–10976	9
90 Cong. Rec. 123, 129	9
H. Rept. No. 302, 78th Cong., 1st Sess	9
S. Rept. No. 382, 78th Cong., 1st Sess	9
Winthrop, *Military Law and Precedents* (2d ed. 1920), 637–649	7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 710

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 10–14) are reported at 239 F. 2d 527.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1956 (R. 14). The petition for a writ of certiorari was filed on January 24, 1957, and was granted on March 4, 1957 (R. 15). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it did in Section 401 (g) of the Nationality Act of 1940, for the expatriation of a native-born

citizen who was convicted of deserting the military forces of the United States in time of war.

STATUTE INVOLVED

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of January 20, 1944 (58 Stat. 4), provided in pertinent part: [1]

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided,* That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to [January 20, 1944], shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom * * *.
>
> * * * * *

[1] The provision is now substantially incorporated in Section 349 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. 1481 (a).

The full text of Section 401, including the other provisions for loss of nationality by native-born nationals, is set forth in the Appendix to the government's brief in *Perez* v. *Brownell*, No. 572, this Term, at pp. 59–61.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Second Circuit (R. 14) affirming the judgment of the District Court for the Eastern District of New York (R. 5–6) which had dismissed petitioner's action for a declaration that he had not lost his citizenship. The pertinent facts may be summarized as follows:

Before a general court-martial convened at Casablanca, French Morocco, on June 7, 1944, petitioner, then a private in the United States Army, was found guilty of two escapes, on May 9 and 22, 1944, respectively, of an absence on May 9, 1944, and of desertion on May 22, 1944 (R. 8–9). He was sentenced, *inter alia,* to be dishonorably discharged from the service and to be confined at hard labor for three years (R. 9). The dishonorable discharge was to be suspended until his release from confinement (R. 9–10).

Petitioner later resumed residence in the United States[2] and applied for a passport in 1952 (R. 2). The State Department denied the passport on the ground that he had lost United States nationality by his conviction of desertion (together with the putting into effect of his dishonorable discharge) (R. 2, 5).

[2] The manner or date of his return, whether as a military prisoner or otherwise, does not appear in the record. He now resides in New York (R. 2).

On December 29, 1955, petitioner commenced the instant proceeding for a declaration of citizenship (R. 1). Both parties moved for summary judgment (R. 5). In support of his motion for summary judgment, petitioner filed an affidavit alleging that, in deserting, he did not intend to expatriate himself or become a national of any other country, and that he did not attempt to contact any enemy of the United States or any foreign country (R. 2–3). The District Court granted summary judgment for the respondent (R. 5–6).

The majority below (per L. Hand, J.), affirming the District Court's holding of loss of nationality, found no sufficient doubt of constitutionality "to resort to any but the natural meaning of the words" *i. e.*, that in time of war "desertion of any kind" results in expatriation (R. 11). The dissenting opinion of Chief Judge Clark was of the view that the statute was unconstitutional as constituting cruel and unusual punishment for desertion (R. 13).

ARGUMENT

I

CONGRESS HAS THE CONSTITUTIONAL POWER TO PROVIDE THAT UNITED STATES NATIONALITY IS LOST BY ONE CONVICTED OF DESERTION IN WARTIME

Petitioner's basic contention (Pet. Br. 6–22) is that the designation of desertion from the armed forces in wartime as a ground for loss of nationality is beyond the constitutional powers of Congress. This issue is discussed in detail in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, together with the

validity of other provisions for loss of nationality under companion subsections of Section 401, *i. e.*, remaining in a foreign country to evade military service, voting in a foreign country, and serving in the armed forces of a foreign country of which one is also a national. The Court is respectfully referred to that discussion for the Government's argument on the question of constitutionality.

Congress provided in 1940, as it had in 1865, that loss of nationality should result from desertion in wartime because that act is a most serious rejection of allegiance at a time of crisis when military service is the fundamental obligation of allegiance. Desertion in wartime is more related to the basic obligations of allegiance than the conduct involved in *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, where the United States citizen sought merely to *add* a further, dual nationality to her American nationality. The nation's needs in avoiding "diplomatic embarrassment" arising from dual nationality (Pet. Br. 8) are not more urgent than the nation's need for defenders. One who seeks an *additional* nationality is not more truly injuring his American nationality and his country than one who, in time of war, deserts the armed forces of that country.[3]

[3] Petitioner's indirect reargument of his conviction of desertion, by five times referring to the "one day" aspect of the desertion (Pet. Br. 2, 4–5, 15, 19), misconceives the seriousness of his conduct, as well as the inappropriateness of the issue here. Petitioner did not embark on a mere "one day" escapade; the shortness of his desertion from Casablanca resulted from the fact that, after reaching Moknes, French Morocco, he was "apprehended" (R. 9). His emphasis below and here upon his lack of resistance to return (R. 4; Pet. Br. 3–4), is not indicative of a contrite change of heart but

And the fact that petitioner may now be stateless does not detract from the power of Congress. See our brief in No. 572, at pp. 35–36.[4]

II

THE STATUTE NEED NOT, AND SHOULD NOT, BE READ AS RELATING ONLY TO DESERTION TO THE ENEMY

Petitioner's suggestion that, in order to avoid a constitutional question, the statute should be construed as relating only to desertion to the enemy (Pet. Br. 22–23) is based on the premise, shown in our brief in No. 572 to be erroneous, that the constitutional power of Congress to designate the conduct which will result in loss of nationality is limited to those situations where the citizen deliberately chooses another nationality, or, at most, to situations where his conduct evinces the acceptance of another nationality. If, as discussed in our *Perez* brief, Congress may condition loss of nationality on acts which adversely affect the cardinal elements of allegiance to the United States,

---

was due to the consideration that "we were on foot and we were getting cold and hungry" (R. 4). The members of the court-martial were in a position, by reason of the specifications at the trial (R. 8–9), to distinguish between petitioner's offenses of absence without leave and the vital offense of desertion in wartime—an offense considered seriously enough by the Congress to permit a death penalty (41 Stat. 800, 10 U. S. C. (1946 ed.) 1530). It is significant that the military authorities did not see fit—as they did in many other cases—to suspend petitioner's dishonorable discharge and to restore him to duty.

[4] In our brief in No. 572, at p. 35, footnote 23, we referred to an *amicus curiae* brief of the American Jewish Congress which was to deal with statelessness. The parties gave consent to such a brief, but it was not filed (because, we understand, of considerations of time).

there is no reason on constitutional grounds to construe the statute other than in accord with its plain terms. And on the basis of those terms the statute cannot fairly be read as relating only to desertion to the enemy.

In military law, the offense of desertion manifestly does not require desertion to the enemy. It was defined in the Articles of War in effect at the time of petitioner's conviction as follows (41 Stat. 792; 10 U. S. C. (1946 ed.) 1499):

> Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

And note the conspicuous absence of any requirement of going over to the enemy, in the extensive discussion of desertion by Winthrop, *Military Law and Precedents* (2d ed. 1920), 637–649.

There is no indication that the definition of desertion under the Nationality Act of 1940 was to be different in any respect from the military offense. Indeed, the requirement that, for loss of nationality, the offender had to be "convicted thereof by court martial" in itself suggests that the military offense of desertion in wartime is the determinant of loss of nationality. Moreover, as the majority opinion below points out (R. 11), the proviso for the possible restoration of nationality by restoration to duty in the armed forces (*supra*, p. 2), is a very persuasive indication that the statute was to apply to desertion without going over to the enemy. One who deserts to the enemy is hardly likely to come back to our forces or to be

restored to duty. In addition, a voluntary desertion to the enemy in wartime would rarely, if ever, be anything short of treason, in itself a basis for loss of nationality without possibility of restoration (see Section 401 (h) of the Nationality Act of 1940, 54 Stat. 1137, Appendix to the Government's brief in No. 572, at p. 61). If petitioner were correct, Section 401 (g) would be unnecessary since desertions to the enemy would be covered by subsection (h), the treason provision. Congress must have envisaged that the instant subsection relating to deserters—with its provision for restoration—would be applicable to those who had simply deserted in wartime without going over to the enemy.

This conclusion is fortified, as also noted by Judge Hand below (R. 12), by the fact that loss of nationality because of a conviction for desertion—in contradistinction to most of the acts of expatriation specified in Section 401 of the 1940 Act—need not occur outside the United States or be followed by residence outside the United States. Under the specific provisions of the Act, expatriation may occur for desertion within the United States. Certainly, in 1940 there was little anticipation by the legislators that desertion would be to the enemy within the United States, despite the ingenious possibilities for such desertion to the enemy within the United States upon which petitioner speculates (Pet. Br. 23). Congress was obviously thinking of desertion in the traditional military sense, and not in the special sense which petitioner reads into Section 401 (g).

Finally, the legislative history of the provision proves conclusively that this is so. As originally enacted in 1940 (54 Stat. 1169), Section 401 (g) simply read:

> (g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; * * *.

The Act of January 20, 1944, 58 Stat. 4, amended Section 401 (g) to provide for restoration and to read as it is set forth *supra*, p. 2. It is perfectly clear that this amendment of January 20, 1944, was expressly designed to help those many servicemen who had been convicted of desertion in World War II (within the United States and abroad), but who had returned or been apprehended, had served their sentences, and had then been restored to duty under the general military policy then prevailing. See H. Rept. No. 302, 78th Cong., 1st Sess.; S. Rept. No. 382, 78th Cong., 1st Sess.; 89 Cong. Rec. 3239–3245, 7107–7108, 10134–10135, 10974–10976; 90 Cong. Rec. 123, 129.[5]

---

[5] The legislative history of the 1944 amendment to Section 401 (g) also indicates that—just as with subsection (j) (draft-evasion) (see our brief in No. 572, pp. 43, 44–45, 53–55)—subsection (g) was considered by Congress to be the direct successor to the 1865 statute discussed in our brief in No. 572 at pp. 41–44.

CONCLUSION

For these reasons, and those set forth in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
J. F. BISHOP,
Attorney.

APRIL 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957